

In Defense of Unpublished Opinions

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What role in today's legal environment should the unpublished opinion play? In this Article, Judge Martin explores both the explosion of litigation that is increasingly taxing the federal courts' resources and the stopgap method of the unpublished opinion. Utilizing published resources as well as his twenty-plus years on the federal bench, he argues that the unpublished opinion will help to conserve judicial resources, will not result in a significant loss to the corpus of federal law, and will perhaps help to streamline the judicial process.

"In my view, multiplied judicial utterances have become a menace to orderly administration of the law. Much would be gained if three-fourths (maybe nine tenths) of [the opinions] published in the last twenty years were utterly destroyed. Thousands of barren dissertations have brought confusion, and often contempt."

—Justice McReynolds¹

I. INTRODUCTION

Justice McReynolds wrote those words more than sixty years ago, but his sentiments ring true today. Appellate judges continue to labor under the weight of tens of thousands of appeals every year, and our "multiplied utterances" would increase beyond all reason were we forced to publish all our opinions.

When I came on the bench in 1979, we were at Volume 602 of the F.2d. Now we are into the F.3d. The last time I checked my overburdened shelves, we were pushing past Volume 133. In 1996 alone, we went from 73 F.3d to 103 F.3d, filling more than 45,000 pages with appellate opinions. At this rate, we will go into the F.4th sometime around 2025. This Article is not about judges' lack of shelf space for the kudzu-like growth of *Federal Reporters*, but the growth is indicative of too much written material creating too little new law.² As

* Chief Judge, United States Court of Appeals for the Sixth Circuit; A.B. 1957, Davidson College; J.D. 1963, University of Virginia School of Law. This Article is the product of a number of discussions in Louisville, Cincinnati, and as we drove between the two with my law clerk Brendan Healey, without whose help this Article would not have been completed.

¹ *Thatch v. Livingston*, 56 P.2d 549, 549–50 (Cal. Dist. Ct. App. 1936) (quoting Justice McReynolds).

² See Hon. Philip Nichols, Jr., *Selective Publication of Opinions: One Judge's View*, 35 AM. U. L. REV. 909, 913 n.13 (1986) (noting rapid growth in publishing rate during his tenure on the federal appellate bench and that "[t]his was when the Judicial Conference selective publication plans had been several years in effect. Without them, one can only guess what the

commentators Carrington, Meador, and Rosenberg have noted: "A large proportion of the opinions that have been coming out of American courts add essentially nothing to the corpus of the law. They are of interest and significance to the parties only. Yet they fill large quantities of pages in the printed reports."³ Lest the thirteen federal circuits become a Tower of Babel, we need a way to sift opinions for publication. Unpublished opinions act as a pressure valve in the system, a way to pan for judicial gold while throwing the less influential opinions back into the stream.

When I see that more than six thousand federal circuit court opinions are published each year,⁴ I am reminded of Ezra Pound's imprecation to "make it new."⁵ How much novelty can there be in this flood of opinions, particularly in light of the relative homogeneity of the federal appellate docket? Roughly twenty-five percent of the cases on the Sixth Circuit docket are federal criminal cases of some sort, and another thirty percent are various forms of federal and state prisoner petitions.⁶ What can we add on these subjects that is new and worthwhile? Indeed, I sometimes believe that in our rush to say something original on yet another 18 U.S.C. § 924(c)⁷ case, for instance, we muddle the process even more.

Whereas academicians tend to see unpublished opinions as causing a variety of systemic problems,⁸ judges tend to see them as a necessary, and not

figure might have been").

³ PAUL D. CARRINGTON ET AL., JUSTICE ON APPEAL 35 (1976).

⁴ See HON. RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 170 (1996).

⁵ EZRA POUND, MAKE IT NEW (Yale University Press, 1935).

⁶ See LEONIDAS RALPH MECHAM, ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS XX (1998).

⁷ A person who violates 18 U.S.C. § 924(c) receives additional prison time for using or carrying a firearm during or in relation to a drug trafficking crime or crime of violence. See 18 U.S.C. § 924(c) (1994).

⁸ See CARRINGTON ET AL., *supra* note 3, at 39–41 (rejecting nonpublication rules and recommending use of memorandum decisions instead); Martha J. Dragich, *Will the Federal Courts of Appeals Perish if They Publish? Or Does the Declining Use of Opinions to Explain and Justify Judicial Decisions Pose a Greater Threat?*, 44 AM. U. L. REV. 757, 802 (1995) ("The courts of appeals' admittedly legitimate concerns with increasing caseloads do not warrant practices that threaten the development of a coherent body of law and fundamentally alter our appellate traditions."); William L. Reynolds & William M. Richman, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 CORNELL L. REV. 273, 284 (1996) [hereinafter Reynolds & Richman, *Elitism*] ("The costs of non-publication are not limited to reduced predictability, accountability, responsibility, and reviewability. It should come as no surprise that unpublished opinions are also dreadful in quality."); William L. Reynolds & William M. Richman, *The Non-Precedential Precedent—Limited Publication and No-Citation Rules in the United States Courts of Appeals*, 78 COL. L.

necessarily evil, part of the job.⁹ I believe that the judges' general approval of the use of unpublished decisions will be reflected in the results of an informal poll currently circulating among the circuits. The Committee on Rules of Practice and Procedure of the Judicial Conference of the United States is surveying judges on whether the rules governing the use and citation of unpublished opinions, which currently vary from circuit to circuit,¹⁰ should be standardized through inclusion

REV. 1167, 1205 (1978) [hereinafter Reynolds & Richman, *Non-Precedential Precedent*] ("The case against the limited publication/no-citation rules is a strong one. The premises upon which the rules are based are subject to serious question, and powerful arguments can be advanced against the entire concept."); Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Court of Appeals*, 87 MICH. L. REV. 940, 946 (1989) ("I argue the selective publication plans, at least in their present form, cannot be supported as a fair or just way to manage the workload of the courts."). *But see* Robert J. Martineau, *Restrictions on Publication and Citation of Judicial Opinions: A Reassessment*, 28 U. MICH. J.L. REFORM 119, 120 (1995) (concluding that "although there are several weaknesses in the administration of rules restricting citation and publication of judicial opinions, the rules should not be eliminated"); William L. Reynolds & William M. Richman, *Limited Publication in the Fourth and Sixth Circuits*, 1979 DUKE L.J. 806, 809 [hereinafter Reynolds & Richman, *Limited Publication*] ("Full exposure and consideration of the arguments reveal that neither the case for nor the case against limited publication is conclusive.").

⁹ My Sixth Circuit colleague, and predecessor as Chief Judge, Gilbert Merritt, has written briefly on the issue of non-publication in another installment of the *Ohio State Law Journal's* "Judges on Judging" series. Judge Merritt noted that "[t]he accountability problem due to nonpublication is [] overstated." Hon. Gilbert S. Merritt, *The Decision Making Process in Federal Courts of Appeals*, 51 OHIO ST. L.J. 1385, 1393 (1990); *see also* POSNER, *supra* note 4, at 171 ("Whether or not limited publication is good on balance—as I think it is, bearing in mind the adage about not making the best the enemy of the good—its drawbacks are serious . . ."); Nichols, *supra* note 2, at 921 ("While a considerable amount of muttering about selective publication still occurs, it appears that judges like it and feel at home with it . . ."). *But see* National Classification Comm. v. United States, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (statement by Judge Wald) (noting arguments against use of unpublished opinions and decrying lack of "uniformly enforced or practiced guidelines for making the publication decision").

¹⁰ *See* D.C. CIR. R. 28(c) (citation of unpublished dispositions); D.C. CIR. R. 36 (criteria for the use of published opinions); 1ST CIR. R. 36.2 (criteria for, use of, and citation of published opinions); 2D CIR. R. 0.23 (dispositions in open court or by summary order); 3D CIR. I.O.P. 5.3 (not-for-publication opinions); 3D CIR. I.O.P. 5.4 (memorandum opinions); 4TH CIR. R. 36(a) (published opinions); 4TH CIR. R. 36(b) (unpublished dispositions); 4TH CIR. R. 36(c) (citation of unpublished dispositions); 5TH CIR. R. 47.5 (criteria for, precedential value of, and use of unpublished opinions); 5TH CIR. R. 47.6 (affirmance without opinion); 6TH CIR. R. 24 (citation of unpublished decisions and criteria for publication); 7TH CIR. R. 53 (criteria for, use of, and citation of unpublished opinions); 8TH CIR. R. 28A(k) (citation of unpublished opinions); 8TH CIR. R. App. I (plan for publication of opinions); 9TH CIR. R. 36 (criteria for publication and requests for publication); 10TH CIR. R. 36.1 (unpublished orders and judgments); 10TH CIR. R. 36.2 (publication criteria); 10TH CIR. R. 36.3 (citation of unpublished

in the Federal Rules of Appellate Procedure. Another question the committee is asking is whether the courts of appeals should continue to designate some opinions as unpublished. I believe we will maintain the status quo. I get the sense from colleagues in my circuit and other circuits that judges are generally happy with the system as it is.

Nonetheless, commentators continue to criticize the circuit courts for hobbling about on the crutch of the unpublished opinion. Here are some criticisms:

- loss of precedent, that unpublished opinions are, in fact, precedent but cannot be used as such;
- sloppy decisions, that judges are careless when they know they are writing an unpublished opinion;
- lack of uniformity, that panels cannot follow other panels when they are unaware of other panels' unpublished opinions;
- difficulty of higher court review, that the Supreme Court is far less likely to review an unpublished opinion than it is to review a published opinion;
- unfairness to litigants, that litigants deserve published opinions;
- less judicial accountability, that the unpublished opinion, particularly the per curiam, allows the judge to hide outside the public glare;
- less predictability, that any opinion provides a roadmap of the law and a sense of the direction in which the law is developing.

This list is not exhaustive, and several commentators have emphasized the drawbacks of unpublished opinions.¹¹

I would like to point out why I am in favor of unpublished opinions. I have already betrayed some of the reasons behind my bias, but I will attempt to flesh them out below. In the course of doing so, I hope to answer many of the critics' cavils. In Part II, I will lay out why we need unpublished opinions—namely too

opinions); 11TH CIR. R. 36-1 (affirmance without opinion); 11TH CIR. R. 36-2 (use and citation of unpublished opinions); 11TH CIR. R. 36-3 (publishing unpublished opinions); FED. CIR. R. 47.6 (use and citation of non-precedential opinions).

¹¹ For litanies of criticisms, see *National Classification Comm. v. United States*, 765 F.2d 164, 173 n.2 (D.C. Cir. 1985) (statement of Judge Wald); POSNER, *supra* note 4, at 165–68; Dragich, *supra* note 8, at 785–800; Martineau, *supra* note 8, at 128–45; Reynolds & Richman, *Elitism*, *supra* note 8, at 281–86; Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 8, at 1189–94. Such criticisms recently caught the attention of *The New York Times*, making front-page news. See William Glaberson, *Caseload Forcing Two-Level System for U.S. Appeals: More One-Word Rulings*, N.Y. TIMES, Mar. 14, 1999, at A1 (reporting that “the proliferation of one-word decisions and other abbreviated procedures is shortchanging litigants in the appellate process by limiting the consideration given to their cases by appeals judges” and that “[o]ne measure of the abbreviated treatment given to many cases . . . is a sharp decline in the number of decisions Federal appeals courts publish”).

many cases with too little merit. In Part III, I will give some background information on the unpublished disposition. In Part IV, I will provide my reasons for advocating the use of unpublished decisions. I will posit two main rationales for the use of unpublished decisions: the practical-minded and the policy-driven.

Finally, in Part V, I will discuss limited citation. I believe that limited citation goes hand in hand with the use of unpublished opinions. Limited citation also answers, in part, the concern of those who denigrate the unpublished opinion by claiming that judges are creating a type of "secret law."¹² I believe this characterization overstates the case. As Judge Nichols once wrote, "hard as it is for academia to believe, the nonprecedent is really not a precedent."¹³ I agree. In order to maintain the non-precedential status of unpublished opinions, though, I believe the Sixth Circuit should tighten its rules on citation of unpublished opinions.

II. TOO MANY CASES, TOO LITTLE MERIT

I respect the views of those who decry the increasing prevalence of unpublished opinions, but I would posit that the alternatives are either worse or unworkable. The alternatives basically come down to changing the input to United States Courts of Appeals or changing the output from them. Aside from the Antiterrorism and Effective Death Penalty Act and Prison Litigation Reform Act,¹⁴ most Congressional statutes seem to increase the caseload of the federal courts.¹⁵ The number of appeals to the circuit courts has increased steadily over the years.¹⁶ The number of appeals per judge has grown unabatedly.¹⁷ I can say

¹² See Dragich, *supra* note 8, at 785–91 (discussing "a secret body of law" and citing to *National Classification Commission*, 765 F.2d at 173).

¹³ See Nichols, *supra* note 2, at 914.

¹⁴ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (to be codified in scattered sections of the Code); Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, §§ 801–10, 110 Stat. 1321–66–21–77 (1996) (to be codified at 18 U.S.C. § 3601) [hereinafter PLRA]. Ironically, the PLRA led to an initial bump in the number of appellate court filings. The PLRA imposes filing fees for prisoners, and the Administrative Office notes that "[m]any inmates may have filed petitions before the fee requirement could be implemented." ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, 1996 JUDICIAL BUSINESS OF THE UNITED STATES COURTS 15 (1997) [hereinafter 1996 JUDICIAL BUSINESS REPORT].

¹⁵ See, e.g., The Violence Against Women Act of 1994, Pub. L. No. 103-322, 108 Stat. 1902 (codified at 18 U.S.C. § 2261 (1994)); see also Hon. Jon O. Newman, *Restructuring Federal Jurisdiction: Proposals to Preserve the Federal Judicial System*, 56 U. CHI. L. REV. 761, 768 (1989) ("The only effective means I see for curbing the growth of federal court caseload is a modest reallocation of jurisdiction from federal to state courts.").

¹⁶ Appeals filed have increased from 48,474 to 51,963 from 1993 to 1997,

anecdotally that when I clerked on the Sixth Circuit in 1963–1964 for Judge Shackelford Miller, Jr. we sat for three weeks at a time and heard three cases a day three days a week. That led to a total of twenty-seven cases during a three-week sitting, and we sat five times a year. Now, the typical Sixth Circuit judge sits for one week at a time but hears oral argument in six cases a day for four days. A Sixth Circuit judge also has as many as four cases on briefs and up to ten motions a day. That adds up to as many as eighty cases and motions in a sitting, and the average active judge on our circuit sits eight times a year.¹⁸ More cases means less time for each disposition and more unpublished opinions.

The size of the appeals, in terms of documents submitted to the court, also has grown. My evidence here is based on personal experience, but I think most judges would agree with me on this point. More briefs are pushing the fifty-page limit,¹⁹ and the joint appendices²⁰ are coming in by the box-load. It is all I can do to lift these appendices, let alone read them.²¹ I do not see any of these trends changing.²² Just as more cases means more unpublished opinions, so too does

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 7 (1997) [hereinafter *FEDERAL STATISTICS*], but the increase is even more dramatic during a longer time span. In 1960, 3,899 appeals were filed. *See* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURT, 1960 ANNUAL REPORT 210 (1961) [hereinafter 1960 REPORT]. The increase in appeals from 1960 to present is more than 1,300 percent.

¹⁷ In 1960, there were 3,899 appeals and 66 active court of appeals judges, which works out to 59 appeals per judge. *See* 1960 REPORT, *supra* note 16, at 205, 210. In 1997, 51,963 appeals were filed, and there were 143 active judges (out of 167 authorized judgeships), which works out to 363 appeals per judge. *See* 1996 JUDICIAL BUSINESS REPORT, *supra* note 14, at 16 tbl. 1. These numbers are just rough estimates because we get a great deal of help from senior judges and district court judges sitting by designation, and I do not want to slight the invaluable assistance of either senior or district court judges. Nonetheless, the numbers show the magnitude of change from 1960 to the present.

¹⁸ The average judge on the Sixth Circuit is scheduled to sit on 32 panels and hears 192 cases a year. In addition, the average Sixth Circuit judge sits on 110 “Rule 9” cases. These cases are disposed of without oral argument pursuant to the Sixth Circuit’s Rule 9. Rule 9s result in a far higher percentage of unpublished opinions than do cases that are orally argued.

¹⁹ *See* FED. R. APP. P. 28(g).

²⁰ The Sixth Circuit requires litigants to submit a joint appendix. *See* 6TH CIR. R. 11. Some joint appendices include more than twenty volumes and are several thousand pages long. It could be worse. Many circuits require submission of the record. I shudder to think of the labor of my peers on other circuits who must wade through these records.

²¹ I learned to speed read in the Army. I would prefer not to have to send my clerks to boot camp and Officer Candidate School merely so they can slog through the volume of written material we receive.

²² *See* CARRINGTON ET AL., *supra* note 3, at 136 (“When all is considered, there is little that can be done about volume. The tide of affairs which produces litigation and appeals is

more time spent wading through voluminous records and briefs mean less time for producing published opinions.

An even greater problem than the workload is the quality of the work. Although district court litigants have an appeal as of right to the courts of appeals, not all choose to avail themselves of this right. The ratio of appellants, however, has changed over time. In 1945, only one out of forty district court cases were appealed; in 1988, one out of eight were appealed.²³ What is an optimal rate of appeal, I do not know, but I do know that too high a percentage of litigants are appealing. This is clear to me when I see litigants bring arguments that contradict settled points of law. It would require a giant leap of faith to believe that all of these appeals have merit and that the appeals now brought have the same merit as those brought at the old ratio. I am unwilling to make that leap of faith, and I am unwilling to publish opinions in all of the cases we hear.²⁴ I do not have data on this, but, from my experience, prime candidates for unpublished opinions are Social Security, Black Lung, and criminal cases as well as prisoner petitions. Some cases in those areas do merit publication, but many do not. The stream of cases coming onto our docket, therefore, has become larger and more diluted in merit. In all likelihood, it will continue to do so.

What about changing the output—making all our opinions published, even if it means writing shorter opinions (anathema to some of my colleagues)? What would happen if, for instance, we were forced to publish all our opinions? We would likely see an across-the-board lessening of quality, because judicial resources would be stretched even further, and we would see scores of remarkably brief and uninformative, but nonetheless “published,” opinions. For the reasons I will outline below, I do not see that as either a likely or a desirable outcome.

III. THE UNPUBLISHED OPINION

A. *History of the Unpublished Opinion*

I do not intend to give a full history of the publication of judicial opinions,²⁵

largely beyond our control.”); Newman, *supra* note 15, at 762 (“There is no reason to believe that the increase in federal court caseload will abate in the decades ahead.”).

²³ See Dragich, *supra* note 8, at 768 n.50 (citing to Federal Courts Study Committee); see also CARRINGTON ET AL., *supra* note 3, at 60 (noting rise in ratio of criminal appeals and noting that in some jurisdictions appeals are taken in more than 90% of criminal cases).

²⁴ See Nichols, *supra* note 2, at 919 (“If all the appeals filed in any intermediate federal court ought to be there, the court would have no need for a selective publication policy. The ones that should not be there create the need.”).

²⁵ For more extensive histories of the publication of judicial opinions, see DONNA

but I would like to give some historical perspective on the publication system, particularly as it relates to my court. The present incarnation of the courts of appeals was established in 1891 through the Evarts Act,²⁶ and the *Federal Reporter* began publishing cases in 1894. When I clerked in 1963–1964, for Judge Miller, we were publishing nearly all our opinions. Other judges published the vast majority of their opinions as well.²⁷ We were on the cusp of change, though. In 1964 the Judicial Conference resolved: “That the judges of the courts of appeals and the district courts authorize the publication of only those opinions which are of general precedential value and that opinions authorized to be published be succinct.”²⁸ According to Reynolds and Richman, “[t]he movement toward limited publication began in earnest in 1971, following a report by the Federal Judicial Center.”²⁹ In 1973, the Federal Judicial Center recognized that “the judicial time and effort essential for the development of an opinion to be published for posterity and widely distributed is necessarily greater than that sufficient to enable the judge to provide a statement so that the parties can understand the reasons for the decision,”³⁰ and provided a set of recommended standards for publication.³¹ Reynolds and Richman reported that “by 1974, each

STIENSTRA, FEDERAL JUDICIAL CENTER, UNPUBLISHED DISPOSITIONS: PROBLEMS OF ACCESS AND USE IN THE COURTS OF APPEALS 5–14 (1985); Mark D. Hinderks & Steve A. Leben, *Restoring the Common in the Law: A Proposal for the Elimination of Rules Prohibiting the Citation of Unpublished Decisions in Kansas and the Tenth Circuit*, 31 WASHBURN L.J. 155, 157–59 (1992); Martineau, *supra* note 8, at 121–26; Reynolds & Richman, *Limited Publication*, *supra* note 8, at 807–08; William L. Reynolds & William M. Richman, *An Evaluation of Limited Publication in the United States Courts of Appeals: The Price of Reform*, 48 U. CHI. L. REV. 573, 577–79 (1981); Donald R. Songer, *Criteria for Publication of Opinions in the U.S. Courts of Appeals: Formal Rules Versus Empirical Reality*, 73 JUD. 307, 307–08 (1990).

²⁶ Act of Mar. 3, 1891, ch. 517, 26 Stat. 826.

²⁷ See Songer, *supra* note 25, at 308 (“It is not known how many decisions of the courts of appeals were not published before 1964, but apparently the number was relatively small.”).

²⁸ JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 11 (1964).

²⁹ Reynolds & Richman, *Limited Publication*, *supra* note 8, at 808.

³⁰ Advisory Council for Appellate Justice, FJC Research Series No. 73-2, Standards for Publication of Judicial Opinions 3 (1973).

³¹ See *id.* at 22–23. The Model Rule for Publication of Judicial Opinions is as follows:

Rule ____

Publication of Appellate Opinions

1. Standard for Publication

An Opinion of the (highest court) or of the (intermediate court) shall not be designated for publication unless:

- a. The opinion establishes a new rule or law or alters or modifies an existing rule; or

circuit had such a plan.”³² According to Reynolds and Richman, “Viewed in historical perspective, limited publication is hardly a radical idea; until recently, case reporting has been a haphazard enterprise. . . . What is new and radical is the notion that the judges themselves should be controlling access to their work by means of systematic publication plans.”³³

These days, “unpublished opinion” is almost a term of art, because all federal appeals court opinions may be published in some way even if not in the official book reporters. All federal appeals court opinions, after all, are part of the public record. Those from the Sixth Circuit can be accessed through our web page. Indeed, unpublished opinions regularly are “published” on Westlaw and LEXIS.³⁴ Given the nature of legal research today, electronic publication is probably more efficacious than book publishing.³⁵ In addition, if a newspaper or legal journal were so inclined, it could reprint unpublished opinions and disseminate them to the world. Unpublished opinions may also show up in specialty reporters. Because these opinions are part of the public record, we

b. The opinion involves a legal issue of continuing public interest; or

c. The opinion criticizes existing law; or

d. The opinion resolves an apparent conflict of authority.

2. Opinions of the court shall be published only if the majority of the judges participating in the decision find that a standard for publication as set out in section (1) of this rule is satisfied. Concurring opinions shall be published only if the majority opinion is published. Dissenting opinions may be published if the dissenting judge determines that a standard for publication as set out in section (1) of this rule is satisfied. The (highest court) may order an unpublished opinion of the (intermediate court) or a concurring or dissenting opinion in that court published.

3. If the standard for publication as set out in section (1) of the rule is satisfied as to only a part of an opinion, only that part shall be published.

4. The judges who decide the case shall consider the question of whether or not to publish an opinion in the case at the conference on the case before or at the time the writing assignment is made, and at that time, if appropriate, they shall make a tentative decision not to publish.

5. All opinions that are not found to satisfy a standard for publication as prescribed by section (1) of this rule shall be marked, Not Designated for Publication. Opinions marked, Not Designated for Publication, shall not be cited as precedent by any court or in any brief or other materials presented to the court.

Id.

³² Reynolds & Richman, *Limited Publication*, *supra* note 8, at 808.

³³ Reynolds & Richman, *supra* note 25, at 575, 577.

³⁴ According to Professor Martineau, the Second, Third, Fifth, and Eleventh circuits do not submit unpublished opinions to Westlaw. *See* Martineau, *supra* note 8, at 144 n.127.

³⁵ This point is driven home to me daily by watching my clerks. They look bewildered when actually reading books in my chambers library and are more frequently found hunched in front of their computer screens doing research on-line. In doing their research, they give me a handful of cases photocopied from books and armloads of cases printed off the computer.

cannot prevent dissemination by others. Therefore, to the extent that unpublished opinions are indeed unpublished it is merely that they are not included in the *Federal Reporters* and are declared “unpublished” by a given court. This has become a fine, almost meaningless, distinction in a world of electronic legal research.³⁶

B. Status of Unpublished Opinions in the Sixth Circuit and Other Federal Circuits

In our circuit, we dispose of cases in a number of manners. We publish signed and per curiam opinions, and we have unpublished signed and per curiam opinions, as well as final orders. Finally, under local Rule 19 the panel can dispose of a case in open court following oral argument if “each judge of the panel believes that no jurisprudential purpose would be served by a written opinion.”³⁷ We “Rule 19” a case by announcing our decision from the bench.³⁸

In the Sixth Circuit, we have a presumption in favor of publishing opinions, although we have a presumption against the publication of orders.³⁹ Our circuit rules mandate that we consider a number of factors when determining whether to publish a decision.⁴⁰ Although some circuits have rules mandating that a

³⁶ See *Hinderks & Leben*, *supra* note 25, at 184 (noting that “in today’s world, the unpublished decisions are functionally just as accessible as the published cases”).

³⁷ 6TH CIR. R. 19.

³⁸ Our Sixth Circuit Rule 19 supplements Federal Rule of Appellate Procedure 36, which discusses entry of judgment. Federal Rule of Appellate Procedure 36 provides for entry of judgment in all cases, including those where “a judgment is rendered without an opinion.” FED. R. APP. P. 36.

³⁹ See 6TH CIR. R. 24(b).

⁴⁰ See 6TH CIR. R. 24(a). Rule 24(a) states:

Criteria for Publication.

The following criteria shall be considered by panels in determining whether decisions will be designated for publication in the Federal Reporter:

- i) whether it establishes a new rule of law, or alters or modifies an existing rule of law, or applies an established rule to a novel fact situation;
- ii) whether it creates or resolves a conflict of authority either within the circuit or between this circuit and another;
- iii) whether it discusses a legal or factual issue of continuing public interest;
- iv) whether it is accompanied by a concurring or dissenting opinion;
- v) whether it reverses the decision below, unless:
 - (a) the reversal is caused by an intervening change in law or fact, or,
 - (b) the reversal is a remand (without further comment) to the district court of a case reversed or remanded by the Supreme Court;
- vi) whether it addresses a lower court or administrative agency decision that has been published; or,

decision be published if it is a reversal of a published decision of the district court,⁴¹ we have no such formal rule in our circuit.⁴² Whether a decision is a reversal does weigh into the calculus, and we produce a relatively low number of unpublished reversals.⁴³ The same is true for opinions that include dissents or concurrences.⁴⁴ It is fair to say that reversals or opinions with dissents are almost always published.⁴⁵

We determine whether we will publish the decision when we caucus in the conference room following oral argument.⁴⁶ Opinions are published unless a majority of the panel votes against publication.⁴⁷ Without betraying the

vii) whether it is a decision which has been reviewed by the United States Supreme Court.

Id.

⁴¹ See D.C. CIR. R. 36(a)(2)(F); 7TH CIR. R. 53(c)(1)(v).

⁴² See 6TH CIR. R. 24(a) (noting that reversal is a factor to be considered in publication decision).

⁴³ In their study of the 1978–1979 reporting year for the United States Courts of Appeals, Reynolds and Richman found that 12 percent of the Sixth Circuit’s unpublished opinions were nonaffirmances (whereas 41 percent of published opinions were nonaffirmances). This was slightly below the national average of 14 percent. See Reynolds & Richman, *supra* note 25, at 617.

⁴⁴ See 6TH CIR. R. 24(a) (noting that concurrences and dissents are factors to be considered in publication decision). The Second, Fifth, Ninth, and D.C. Circuits require publication of decisions accompanied by a concurrence or dissent. See 1ST CIR. R. 36.2(b)3 (providing for publication of opinion with dissent or concurrence unless all judges on panel decide against publication); 2D CIR. R. 0.23 (allowing summary disposition when decision unanimous); 9TH CIR. R. 36-2(g) (providing for publication of opinion with concurrence or dissent if “author of separate expression requests publication”).

⁴⁵ In their 1978–1979 study, Reynolds and Richman found that only four of the 908 unpublished opinions in the Sixth Circuit (0.4 percent) included a dissenting or concurring opinion. The national average was 0.5 percent. See Reynolds & Richman, *supra* note 25, at 614. These data are dated, but I suspect the numbers would be comparably low today.

⁴⁶ Occasionally, a Sixth Circuit judge will write an opinion and decide that it should be published or conversely receive an opinion from another judge that appears to merit publication. A short fax or e-mail to the other judges on the panel is usually sufficient to gain their agreement on a decision to publish. This is seldom a contentious issue.

⁴⁷ See 6TH CIR. R. 24(b). For procedures in other circuits, see 1ST CIR. R. 36.2(b) (unanimous vote required for unpublished decision); 2D CIR. R. 0.23 (no discussion of procedure); 3D CIR. I.O.P. 5.3 (majority of panel for nonpublication); 4TH CIR. R. 36(b) (publication if author of opinion or majority of panel believes opinion satisfies one or more standards for publication); 5TH CIR. R. 47.5.2 (unanimous vote required for nonpublication); 7TH CIR. R. 53(d) (majority of panel required for nonpublication); 8TH CIR. R. APP. I (“Court or a panel will determine which of its opinions are to be published, except that a judge may make any of his opinions available for publication.”); 9TH CIR. R. 36-2 (no discussion of

confidentiality of the conference room, I can say that we seldom hold a formal vote on publication. Generally, our judges are in consensus on the question of publication. If one judge strongly believes in publication, the other judges generally acquiesce to his or her wishes.⁴⁸ During my twenty years on the Sixth Circuit and having heard thousands of cases, I can say I have heard no more than a handful of true disagreements over the issue of publication. Judges on the Sixth Circuit do differ, and often vigorously, but seldom on the question of publication.

The Sixth Circuit provides no mechanism for the parties to make publication requests. Some circuits do allow the parties to request that opinions be published.⁴⁹ I believe the Sixth Circuit's approach is a strength rather than a weakness. As Professor Robel points out, allowing the parties to request publication can be a boon for frequent litigators, particularly the government.⁵⁰ According to her thesis, frequent litigators are familiar with the body of published and unpublished law on an issue and can "stack the precedential deck."⁵¹ Although I cannot speak from experience, because our circuit does not normally allow such motions, my intuition is that Professor Robel overstates the case. I question whether anyone in government operates according to such a grand plan. Anyone familiar with any level of government knows that it rarely acts according to a overarching plan on any issue, let alone something as complex as building a body of favorable legal precedent. Nonetheless, to the extent there is precedential abuse with the transformation of unpublished opinions into published opinions at the litigants' behest, our circuit normally avoids it.

C. Prevalence of the Unpublished Opinion

Historical data on numbers of unpublished opinions are hard to find. Professor Songer notes:

Fragmentary evidence suggests that the number of unpublished opinions began to escalate sharply in most circuits in the mid 1970s and that it has leveled off in the 1980s. However, it is clear that at present a majority of all final decisions by

procedure); 10TH CIR. R. 36.2 (no discussion of procedure); 11TH CIR. R. 36-2 ("An opinion shall be unpublished unless a majority of the panel decides to publish it."); FED. CIR. R. 47.6 (no discussion of procedure).

⁴⁸ I should also note that my clerks play absolutely no role in the publication decision.

⁴⁹ See D.C. CIR. R. 36(d); 1ST CIR. R. 36.2(b)4; 4TH CIR. R. 36(b); 5TH CIR. R. 47.5.2; 7TH CIR. R. 53(d)(3); 9TH CIR. R. 36-4; 11TH CIR. R. 36-3; FED. CIR. R. 47.6(c).

⁵⁰ See Robel, *supra* note 8, at 958.

⁵¹ See *id.* at 958; see also Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 8, at 1179 (arguing that a habitual litigant could make publication requests of favorable outcomes and law "would develop in a lopsided fashion").

judges on the courts of appeals are unpublished and that the rate of nonpublication varies widely among circuits.⁵²

Professor Songer's analysis jibes with my experiences on the Sixth Circuit. Professor Beyler found in a study of data from 1987 that 80.7 percent of the Sixth Circuit's decisions were unpublished.⁵³ The average for the six circuits he studied was 62.4 percent.⁵⁴ Professor Robel found that 61 percent of opinions were unpublished in 1987.⁵⁵ Professor Martha Dragich found that there were more than 10,000 unpublished opinions in 1993.⁵⁶

The Administrative Office provides current information on unpublished opinions in the courts of appeals. According to the Administrative Office, 76 percent of "Opinions or Orders Filed in Cases Terminated on the Merits After Oral Hearing or Submission on Briefs" were unpublished in 1995–1996.⁵⁷ The Sixth Circuit was right around the average with 78.9 percent unpublished dispositions, and the Fourth Circuit was the highest with 90.3 percent.⁵⁸ There were an aggregate of 20,771 oral; written, signed, and unpublished; written, reason, unsigned, and unpublished; and written, unsigned, without comment, and unpublished; dispositions.⁵⁹

IV. SUPPORTING UNPUBLISHED OPINIONS

I believe that practicality and policy are strong arguments in support of the use of unpublished opinions. On the practical side, we use unpublished opinions in order to get through our docket. Policy-wise, we need to be able to distinguish those opinions worthy of publication, and of making a meaningful contribution to our body of precedent, from those that merely apply settled law to decide a dispute between parties.

A. Practicality

I already have outlined the increasing workload of the courts of appeals, in both absolute terms and in relation to individual judges, but what relation does

⁵² Songer, *supra* note 25, at 308.

⁵³ See Keith H. Beyler, *Selective Publication Rules: An Empirical Study*, 21 LOY. U. CHI. L.J. 1, 7 (1989).

⁵⁴ See *id.*

⁵⁵ See Robel, *supra* note 8, at 955 n.74.

⁵⁶ See Dragich, *supra* note 8, at 760.

⁵⁷ See 1996 JUDICIAL BUSINESS REPORT, *supra* note 14, at 47, Table S-3.

⁵⁸ See *id.*

⁵⁹ See *id.*

that have to unpublished opinions? The answer is quite simple, and was verified by Professor Beyler in his empirical study of unpublished opinions: “[S]elective publication significantly enhances the courts’ productivity.”⁶⁰

Here, I can speak from experience. Although I believe that we bring the same standards of excellence to unpublished opinions as we do to published opinions, I would estimate that my clerks and I spend about half as much time working on the average unpublished decision.⁶¹ We save time because unpublished decisions are, as a rule, shorter than published decisions. My unpublished decisions average three to five typewritten pages whereas my published opinions tend to run five-plus pages. (You may notice that I write unusually short appellate opinions, but I will save my thoughts on that subject for another day.)

I keep unpublished decisions short because they tend not to include extensive renditions of the facts or exhaustive discussions of the law. Unpublished decisions tend to involve straightforward points of law—if they did not, they would be published. These types of cases are fact-driven. They involve settled law and variations on the facts. I give the facts to the extent necessary and then state the law.

The relative straightforwardness of the legal questions in an unpublished opinion also saves research time. I would estimate that I spend equal amounts of time researching and writing the average published opinion. It is difficult to say for sure because the activities are intertwined. I will spend less than half as much time researching a typical unpublished opinion as I spend on a published opinion. Some legal questions are easily answered, particularly after eighteen years on the federal bench. A judge sees the same questions repeatedly, and one needs not go back to the research well to answer every question. I assume my colleagues have the same experience.

I will admit that one element of the practicality argument has largely disappeared. Prior to the advent of computerized research, one argument for the use of unpublished opinions was that they reduced the corpus of law found on

⁶⁰ Beyler, *supra* note 53, at 12. *But see* Reynolds & Richman, *supra* note 25, at 594, 596 (noting that “cases culminating in unpublished opinions are resolved more quickly” but that their data “provide no support for the hypothesis that limited publication enhances productivity”).

⁶¹ This estimate does not take into account the occasional “monster” case that meanders across our docket. *See, e.g.,* Sprague v. General Motors Corp., 133 F.3d 388 (6th Cir. 1998) (en banc) (Martin, C.J., dissenting); Sprague v. General Motors Corp., 92 F.3d 1425 (6th Cir. 1996) (vacated); *In re* Dow Corning Corp., 86 F.3d 482 (6th Cir. 1996); Levinson v. Basic Inc., 786 F.2d 741 (6th Cir. 1986) (vacated). These cases consume an inordinate amount of my and my clerks’ time. We never have a “monster” unpublished decision.

library shelves and the amount of time needed to wade through those books.⁶² Unpublished opinions still do save trees and library budgets, but bound books, as I have discussed, are no longer the primary locus of research.⁶³ Now, unpublished opinions are easily searched on-line. This has eased (although not eliminated) the genuine concerns about overburdened libraries running out of space and money for multiplying reporters. Although I assume that most libraries continue to purchase the *Federal Reporter*, smaller law firms need not do so. Unpublished opinions do save on library expenses, but such savings are less meaningful now that books are no longer the primary legal research tool.

Practicality is only one element of the equation, though, and I believe it is never the deciding factor in determining whether to publish any opinion. By that I mean that I never turn to my colleagues in the conference room and say, "Look, we all know we're overwhelmed by an expanding federal docket and litigants who appeal cases that have no reason to be in a federal appeals court so let's just save our time, and various libraries' money, by whipping out some unpublished opinions on today's cases." Unpublished opinions in the aggregate are a timesaver for judges and their staffs, but in individual cases the decision on whether to publish is based on the merits of the case.

B. Policy

To advocate use of unpublished opinions is not to deprecate published opinions. In fact, judicious use of unpublished opinions gives greater emphasis to those that are published. It separates the diamonds from the dross—and, although many on the other side of the bench would be unwilling to admit it, there is a lot of dross.⁶⁴ I am repeating myself, but not all cases are of equal merit. If we publish everything, the truly meritorious cases will be lost in a flood of opinions on minor issues. We are now filling roughly thirty *Federal Reporters* a year. We would probably fill twice as many if we published all our opinions. Not all cases deserve a published opinion, even if they merit a written opinion.

Some have questioned whether judges can correctly distinguish between

⁶² See CARRINGTON ET AL., *supra* note 3, at 35 (noting that "library costs for private law offices and governmental libraries are thereby increased, both through the purchase price of the books and through the added expense of shelving and maintaining them").

⁶³ See *supra* text accompanying notes 34–36.

⁶⁴ See CARRINGTON ET AL., *supra* note 3, at 90 ("[H]opeless appeals can clog the judicial system and cause an erosion of the process which results in less adequate justice for those appellants who do have substantial questions to raise."); POSNER, *supra* note 4, at 166 ("Most criminal appeals have no merit and are filed only because the cost of appeal to most criminal defendants is zero.").

cases meriting publication and those not worthy of publication.⁶⁵ I believe that in an extremely high percentage of the cases we hear we can make this distinction. Federal appellate judges are in the best position to do that culling. We are trusted sufficiently to decide a case. Why can't we be trusted enough to then make the ancillary decision whether it should be published? This goes back to the point I made earlier about the lack of contention regarding decisions to publish.⁶⁶ The publication decision is, quite simply, almost invariably an easy call to make. Cases either clearly merit publication, or they clearly do not. Therefore, we as judges seldom dicker over the publication issue and seldom make mistakes in dividing up the cases between published and unpublished. This is not to say that judges are infallible—our mistakes are many and often highly publicized—but the publication decision is seldom a potential pratfall for a federal appellate judge.

Perhaps it is just my innate sense of neatness, but I do believe there is value in making distinctions among cases. We are creating a body of law. There is value in keeping that body cohesive and understandable, and not muddying the water with a needless torrent of published opinions.⁶⁷ We are living in the midst of an information explosion, not just in the legal realm, but across all fields. In order to navigate our way through this morass of information, we as judges need the latitude to highlight the worthwhile cases.

I do believe that we should write something in nearly all cases. Our court allows cases to be dispensed of orally from the bench in the form of our so-called "Rule 19s."⁶⁸ I am not a proponent of this and seldom engage in the practice, but some appeals are so wholly meritless that they beg a Rule 19. We "Rule 19"

⁶⁵ See Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 8, at 1194 (explaining that evidence exists that "judges cannot, at the time of writing, correctly distinguish between lawmaking and dispute-settling opinions"); see also Songer, *supra* note 25, at 309 (noting that "several critics have questioned the ability of judges to make consistent decisions about whether a decision is non-precedential, especially when the decision on publication is often made before an opinion is written").

⁶⁶ See *supra* text accompanying notes 46–48.

⁶⁷ See Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 WIS. L. REV. 11, 33 ("[T]he vast number of decisions entered threatens coherence by creating innumerable rulings which are impossible to assimilate.").

⁶⁸ See 6TH CIR. R. 19. The relevant section states:

Dispositions in Open Court

In those cases in which the decision is unanimous and each judge of the panel believes that no jurisprudential purpose would be served by a written opinion, disposition of the case may be made in open court following oral argument

Id.

roughly seven percent of the cases in which we hear oral argument.⁶⁹ I believe this percentage is higher than it should be. The overwhelming majority of our litigants deserve a cogent, written explanation of our decision, even if that opinion is unpublished. Even when we are merely rendering a decision, as opposed to “making law,” the litigants deserve to know our rationale.

One argument in favor of published opinions is that they tend to buttress precedents on certain points.⁷⁰ I disagree with the premise and the practice behind that argument, however. The premise that a precedent needs to be buttressed with cites to various minor cases is faulty. When the Supreme Court or Sixth Circuit has spoken in a clear voice, I do not see the need to augment that citation with other citations. Good precedent is good precedent. One does not need to pile on the excess verbiage of string cites to random, minor cases. String cites are largely a product of judges’ and clerks’ experience on law journals and at law firms—tribes in which overkill is an art form. When I read a lengthy string cite in a brief or slip opinion, I often find that I have lost the gist of the argument after fighting through line after line of gobbledygook. I see no need for more published opinions in order to flesh out unneeded string cites.

V. UTILIZING LIMITED CITATION IN ORDER TO MAINTAIN THE STATUS OF UNPUBLISHED OPINIONS

I will close my defense of unpublished opinions with what may strike some as an about-face or at least a veering off course. I believe in the utility of unpublished opinions for judges, but I do not see them playing a role for litigants. Therefore, as strongly as I believe in the production of unpublished opinions, I am just as adamantly opposed to the citation of unpublished opinions. This is the gravamen of this Article. As I have shown above, unpublished opinions are unpublished in name only.⁷¹ What distinguishes them from published opinions are citation limits. Without such limits there is virtually no distinction between published and unpublished. If we do not discourage citations to unpublished

⁶⁹ In 1997, out of 1,464 Sixth Circuit cases decided following oral argument, 99 were disposed of through Rule 19. Rule 19s become a smaller percentage of dispositions, though, when the total number of dispositions, which includes cases not argued orally, is considered. There were 4,523 total dispositions in the Sixth Circuit in 1997. We disposed of 80 cases through Rule 19 in 1995–1996, and the only other circuit to dispose of cases in this manner was the Second. It disposed of two cases orally. *See* 1996 JUDICIAL BUSINESS REPORT, *supra* note 14, at 47 tbl. S-3.

⁷⁰ *See* Reynolds & Richman, *Non-Precedential Precedent*, *supra* note 8, at 1190 (“The sheer number of affirmations allows attorneys to rely on the stability of a doctrine with greater confidence.”).

⁷¹ *See supra* text accompanying notes 34–36.

opinions, then we are creating a type of second-class precedent. This does not help anyone.

Our Circuit currently straddles the fence on the citation of unpublished opinions. According to Sixth Circuit Rule 24(c):

Citation of unpublished decisions by counsel in briefs and oral arguments in this court and in the district courts within this circuit is disfavored, except for the purpose of establishing *res judicata*, estoppel, or the law of the case.

If counsel believes, nevertheless, that an unpublished disposition has precedential value in relation to a material issue in a case and that there is no published opinion that would serve as well, such decision may be cited if counsel serves a copy thereof on all other parties in the case and on the court. Such service may be accomplished by including a copy of the decision in an addendum to the brief.⁷²

Although I cannot claim encyclopedic knowledge of publication practices in other circuits,⁷³ I am familiar enough with their rules to say that the Sixth Circuit is more liberal than most in the amount of citation to unpublished opinions that it allows.

I would like to see Rules 24(c) and 10(f) tightened. According to the Rules, citation to unpublished opinions is merely “disfavored.” Professor Dragich calls this “an unacceptably ambiguous statement of precedential effect,”⁷⁴ and I agree. We cannot forbid litigants from citing to unpublished opinions. Litigants can cite to whatever sources they desire. We can, however, inform litigants that unpublished opinions have no precedential value and are not even the least bit

⁷² 6TH CIR. R. 24(c). This material is also covered in Sixth Circuit Rule 10(f). Rule 10 covers briefs, and Rule 10(f) is substantively identical to Rule 24(c).

⁷³ See D.C. CIR. R. 28(c) (unpublished opinions not precedent); 1ST CIR. R. 36.2(b)6 (unpublished opinions only citable in related cases); 2D CIR. R. 0.23 (no citation of summary dispositions); 3D CIR. I.O.P. 5.3 (making no mention of precedential value of unpublished opinions but noting that opinion is published when it has precedential value); 4TH CIR. R. 36(c) (court will not cite unpublished opinions and citation to court disfavored except for *res judicata*, estoppel, and law of case); 5TH CIR. R. 47.5.3 (“Unpublished opinions issued before January 1, 1996 are precedent.”), 5TH CIR. R. 47.5.4 (“Unpublished opinions issued on or after January 1, 1996 are not precedent.”); 7TH CIR. R. 53(b)(2)(iv) (unpublished opinions not precedent except for *res judicata*, collateral estoppel, or law of the case); 8TH CIR. R. 28A(k) (unpublished opinions generally not precedent but may be cited “if the opinion has persuasive value on a material issue and no published opinion of this or another court would serve as well”); 9TH CIR. R. 36-1 (defining published as available for citation); 10TH CIR. R. 36.3 (unpublished decisions not binding precedent but may be cited for persuasive value); 11TH CIR. R. 36-2 (unpublished opinions are not binding precedent but may be cited as persuasive authority); FED. CIR. R. 47.6(b) (unpublished opinions not precedential).

⁷⁴ Dragich, *supra* note 8, at 791.

persuasive.⁷⁵ We would be telling litigants that they can cite to unpublished opinions but should not—that it would be a waste of their and the court's time. These strict guidelines would, I believe, act as a *de facto* ban on citation to unpublished opinions except for situations of *res judicata*, estoppel, or law of the case. The Sixth Circuit did place strict limits on citation to unpublished opinions until 1988, when we changed our circuit rule.⁷⁶ I admit that the change in the rule has not opened the floodgates to citation of unpublished opinions. I would estimate that perhaps ten to twenty percent of the briefs we see include unpublished opinions. Nonetheless, other circuits take a hard line on citation of unpublished opinions,⁷⁷ and I believe the Sixth Circuit should do so as well.

Eliminating citation of unpublished opinions would save research time for judges and litigants. The typical search of the Sixth Circuit database on Westlaw turns up published and unpublished decisions, and the decisions are clearly marked as such. Judges and litigants could gloss over the unpublished decisions because they are of little use, and concentrate on the meaningful decisions. This solution answers, in part, Professor Dragich's criticism that "[e]ven if the argument that there is 'too much law' is credible, selective publication does not solve the problem. It does not reduce the amount of law, but actually creates an additional, less accessible body of law that must be consulted, making research more difficult and raising the cost of litigation."⁷⁸ The incentive to consult unpublished opinions would be far lower if we strongly discouraged citation for any purpose but collateral estoppel, law of the case, or *res judicata*.

The strict limits on citation to unpublished opinions would eradicate most of the lingering inequity in the system. The inequity comes from litigants' unequal access to unpublished opinions.⁷⁹ We already have eliminated much of the inequity by requiring parties to submit copies of unpublished opinions to which they cite.⁸⁰ This practice allows underfinanced litigants who cannot afford the necessary Westlaw or LEXIS time to have access to the unpublished decisions their opponents are using.

⁷⁵ Other circuits specifically and explicitly inform litigants that unpublished opinions are of no precedential value. *See* D.C. CIR. R. 28(c); 5TH CIR. R. 47.5.4; 8TH CIR. R. 28A(k); 9TH CIR. R. 36-3; 10TH CIR. R. 36.3; 11TH CIR. R. 36-2; FED. CIR. R. 47.6(b).

⁷⁶ Our old Sixth Circuit Rule 11, which referred to the joint appendix, read in part: "Decisions of this court designated as not for publication should never be cited to this court or in any material prepared for this court. No such decision should be published by any publisher unless this rule is quoted at a prominent place on the first page of the decision so published."

⁷⁷ *See* Dragich, *supra* note 8, at 762 n.17.

⁷⁸ *Id.* at 787.

⁷⁹ *See* POSNER, *supra* note 4, at 167 (noting that "[t]he institutional litigant has easier access to unpublished opinions").

⁸⁰ *See* 6TH CIR. R. 24(c); 6TH CIR. R. 10(f).

I argue for limited citation from a selfish standpoint, too. If judges are producing pseudo-published opinions (and who can argue that an opinion available electronically is not published for all intents and purposes?), it will not save us any time if those opinions are being cited back to us. We will have to prepare unpublished opinions as we do published opinions—as if they were creating precedent. On this point, I agree with the testimony of Judge Sprecher before the Hruska Commission Senate hearings on the revision of the federal court appellate system:

Finally, and I think this is really the crux of the question of citation, personally I would think that if a no-citation rule did not go hand in hand with a no publication rule, I would feel that we should do away with the no-publication rule and go back to the old full publication rule, and that is because of the question of *stare decisis*.⁸¹

I am not making the argument that unpublished opinions should not be cited because they are of no precedential value—litigants see precedential value in virtually every opinion they cite even if the court does not agree.⁸² In addition, there is precedential value in any opinion if only for that case. Limiting citation, however, will serve as a *de facto* cap on any precedential value an unpublished decision might have.

If we were strongly to discourage litigants from citing to unpublished opinions, then we as a court would have to follow our own rules and quit citing to unpublished opinions. I will admit that I occasionally have fallen into the trap, and it is a trap, of citing to unpublished opinions.⁸³ I discourage my clerks from citing to unpublished opinions in their bench memoranda, but sometimes they backslide, and so do I. I would estimate that I cite to unpublished opinions in less than five percent of my opinions, but even that percentage is too high. It should be zero.

I realize that counsel will continue to use unpublished decisions, even if they

⁸¹ COMMISSION ON REVISION OF THE FEDERAL COURT APPELLATE SYSTEM, STRUCTURE AND INTERNAL PROCEDURES: RECOMMENDATIONS FOR CHANGE 51 (1975).

⁸² See POSNER, *supra* note 4, at 166 ("It might seem almost as a matter of definition that all opinions have some actual or potential precedential value.").

⁸³ See, e.g., *Sprague v. General Motors Corp.*, 133 F.3d 388, 412 (6th Cir. 1998) (Martin, C.J., dissenting) (en banc) (citing to *Gentile v. Youngstown Steel Door Co.*, No. 84-3648, 1986 WL 17464 at *5 (6th Cir. Aug. 25, 1986)); *Strickland v. Shalala*, 123 F.3d 863, 868 (6th Cir. 1997) (citing to *Ohio Department of Human Services v. United States Department of Health and Human Services Admin. for Children and Families*, No. 96-3606, 1997 WL 415319 (6th Cir. July 22, 1997)); *Sprague v. General Motors Corp.*, 92 F.3d 1425, 1436 (6th Cir. 1996) (vacated) (citing to *Gentile v. Youngstown Steel Door Co.*, No. 84-3648, 1986 WL 17464 at *5 (6th Cir. Aug. 25, 1986)).

do not cite to such dispositions. An unpublished opinion could point counsel in a new direction or give an otherwise overlooked cite and thereby prove advantageous. This leads to some inequity—those with the financial wherewithal to roam Westlaw and LEXIS in search of unpublished opinions will have an advantage over less-privileged litigants. In some ways, this advantage will be more insidious than that enjoyed by the litigant who merely cites to an unpublished opinion under the current rule. Now, the litigant who cites to an unpublished opinion is forced to provide a copy of the opinion to the other party and the court. The litigant who garners ideas and arguments from unpublished opinions but does not cite to them, however, need never reveal the paper trail.⁸⁴ This is a weakness in the use of unpublished opinions that no-citation rules will not eradicate. I do not believe, however, that it is sufficient to warrant the elimination of unpublished opinions. Judge Nichols refers to the fear that litigants will speak in a secret code to judges by surreptitiously quoting those judges' unpublished opinions back to them as a "hobgoblin."⁸⁵ I agree. Carrington, Meador, and Rosenberg argue that trying to make a no-citation rule effective is "like attempting to throw away a boomerang"⁸⁶ because unpublished opinions nonetheless slip into court discourse, but, as Chief Judge Posner has written, one should not "mak[e] the best the enemy of the good."⁸⁷

VI. CONCLUSION

Unpublished decisions are, as used to be said about children, best seen but not heard. We as a court will continue to produce unpublished decisions, but we do not want to hear them being cited back to us. Unpublished decisions are a necessity to our judicial system, but I agree with those commentators who seek to limit their precedential value. We do not seek to create a body of secret law, but we often feel a responsibility to explain our decisions to litigants. Unpublished opinions give us the flexibility to inform parties of our decision without adding to the clutter, and sometimes confusion, of our multitudinous array of published decisions.

⁸⁴ See CARRINGTON ET AL., *supra* note 3, at 37 (no-citation rule "will not prevent counsel from trying to divine the reasoning of that decision and then using it in the case at bar"); Robel, *supra* note 8, at 956 (noting that "the 'guts' of the opinion—its reasoning, citations to authority, and such—can still be effectively employed through incorporation in briefs and arguments").

⁸⁵ See Nichols, *supra* note 2, at 918.

⁸⁶ CARRINGTON ET AL., *supra* note 3, at 37.

⁸⁷ POSNER, *supra* note 4, at 171.

